No. 295

Office-Supreme Court, U.S.
FILED
JUL 17 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

JOSEPH BATTISTA, FRANK DIGIAMBATTISTA AND ALBERT B. DIGIAMBATTISTA, trading as NOB-VIEW FARM, *Appellants*,

v.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

On Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

FREDERICK A. BALLARD
JOHN W. KERN, III
912 American Security Building
Washington, D. C. 20005

J. BROOKE AKER
60 E. Penn Street
Norristown, Penn., 19404

Attorneys for Joseph Battista, et al., Appellants

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	4
Statute Involved	4
Statement	5
The Question Is Substantial	9
Alternate Consideration	18
Exhibit A: Opinion of Pennsylvania Supreme Court, 413 Pa. 652	1a
Exhibit B: Opinion of Montgomery County Court of Common Pleas, 81 Montg. 366	8a

TABLE OF CITATIONS

CASES CITED:

Baldwin v. *Seelig*, 294 U. S. 511 (1935)	3
Dec. Milk Co. v. *Madison*, 340 U. S. 349 (1951)	3
Highland Farms Dairy v. *Agnew*, 300 U. S. 608 (1937)	3
Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346 (1939)	10, 11, 13
Nebbia v. *New York*, 291 U. S. 502 (1934)	3, 9, 10, 13
Polar Ice Cream & Creamery Co. v. *Andrews, et al., Constituting the Florida Milk Commission, et al.*, 375 U. S. 361 (1964)	3

STATUTES CITED:

Statute of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. § 1257(2)	3, 9, 18
Pennsylvania Milk Control Law, Section 402, 1937 P.L. 417, 1959 P. L. 1587, 31 P.S. § 700j-402	2, 4, 6, 7, 11, 13, 17
1937 L. ch. 383, § 1, as am., 2 B McKinney's Consolidated Laws of New York Annotated, Art. 21, § 258-m	14

MISCELLANEOUS SOURCES CITED:

Pa. Crop Reporting Service Bulletin 18, Pa. Dairy Statistics	14

IN THE

Supreme Court of the United States

No.

JOSEPH BATTISTA, FRANK DIGIAMBATTISTA AND ALBERT B. DIGIAMBATTISTA, trading as NOR-VIEW FARM, *Appellants,*

v.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, *Appellee.*

On Appeal From the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Appellants appeal from the decree and order by the Supreme Court of Pennsylvania entered on March 24, 1964, reversing the judgment of the Court of Common Pleas of Montgomery County (Pa.) which dismissed a complaint in equity brought by appellee under Section 402 of the Pennsylvania Milk Control Law on the ground that this section of the statute was unconstitutional as applied to appellants. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court appealed from has been reported in the official reports at 413 Pa. 652, appearing in Vol. 17 No. 18 of the Advance Reports issued May 1, 1964, and in the unofficial reports at 198 A 2d 840. A copy of this opinion is appended hereto as Exhibit A.

The opinion of the lower court, the Court of Common Pleas of Montgomery County, is reported in the official reports at 81 Montg. Co. L.R. 366, and has not yet been reported in any unofficial reports known to appellants. A copy of this opinion is appended hereto as Exhibit B.

JURISDICTION

(i) This case originated on a complaint in equity filed by the Milk Control Commission of the Commonwealth of Pennsylvania seeking an injunction to restrain appellants from selling milk at unregulated prices on the allegation that the statutory exemption from price regulation contained in Section 402 of the Pennsylvania Milk Control Law, 1937 P.L. 417, as last amended 1959 P.L. 1587, 31 P.S. § 700j-402, was inapplicable to present appellants because they temporarily removed the milk from the producing farm from which the retail sales were made in order to have the milk pasteurized, homogenized and bottled. Appellants filed preliminary objections claiming that the condition in question (barring retail sales from the producing farm at unregulated prices if the milk is removed for pasteurization) violated the due process clause of the Federal and of the State Constitutions.

(ii) The Pennsylvania Supreme Court decree was filed March 24, 1964; there was no rehearing; and the

notice of appeal to this Court was filed on May 20, 1964 with the Prothonotary of the Supreme Court of Pennsylvania.

(iii) This appeal is taken pursuant to statute of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. § 1257(2), the Pennsylvania Supreme Court having sustained the section of the statute in question as constitutional.

(iv) It is believed that the following cases sustain the jurisdiction:

Nebbia v. *New York*, 291 U.S. 502 (1934) which arose on appeal from the judgment of the County Court entered on remittitur after the New York Court of Appeals affirmed the validity of the milk control statute and where the issue was whether or not the statute violated the due process clause of the Fourteenth Amendment of the United States Constitution. Although *Nebbia* v. *New York* is relied upon as showing that the present case is properly brought to this Court by appeal, it is submitted that a substantial federal question remains to be decided in the present case for the reasons set forth hereinafter.

Although no milk control cases appealed to this Court subsequent to *Nebbia* v. *New York*, have been found to involve the due process clause, there have been several cases which have arisen on appeal involving the interstate commerce clause (*Baldwin* v. *Seelig*, 294 U.S. 511 (1935); *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937); *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951)). The latest milk control case to be heard by this Court also involved the interstate commerce clause, *Polar Ice Cream & Creamery Co.* v. *Andrews et al., Constituting the Florida Milk Commission, et al.*, 375 U.S. 361 (decided January 6, 1964)

which arose on appeal from the U.S. District Court for the Northern District of Florida which court had sustained the state statute in question.

Despite the difference in issues, it is believed that all of these cases demonstrate that the present case is properly brought before this Court by appeal.

QUESTION PRESENTED

The following question is presented by this appeal:

Is the statutory classification in the Pennsylvania Milk Control Law which permits farmers to sell from the farm at unregulated prices either raw milk or milk produced and pasteurized on the farm but which would deny to appellants the right to sell at unregulated prices milk produced and sold from the farm where produced but which milk is taken off the farm temporarily only for purposes of pasteurizing, homogenizing and bottling, an unreasonable and capricious classification which bears no relation to the objectives sought to be attained by the legislation and hence is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

STATUTE INVOLVED

The state statute involved in this appeal is Section 402 of the Pennsylvania Milk Control Law, 1937 P.L. 417 as amended 1941 P.L. 443, 1959 P.L. 1587, 31 Purdon's Statutes § 700j-402, and especially that portion of which is italicized in the following quotation of the entire Section 402:

> "The commission may, by official order, exempt from the license requirements provided by this act milk dealers or handlers who purchase or handle milk in a total quantity not exceeding one thousand five hundred pounds in any month, and milk

dealers or handlers selling milk in any quantity only in markets of a population of one thousand, or less, for local consumption. The commission may, by official order, exempt stores, or any class thereof, from the license requirements provided by this act, and shall exempt stores selling milk, all of which has been purchased or acquired from a licensed milk dealer or handler. However, milk dealers or handlers exempted by this section from the license requirements of this act shall continue to be subject to all the other provisions of this act relating to milk dealers or handlers: *Provided, however, That in cash sales of milk to consumers in containers owned and provided by the consumer, if he shall have produced all the milk on the farm where sold and such milk has at no time left the producer's farm prior to its sale to the consumer and he shall have neither purchased nor received milk from other producers or handlers and his total sales to consumers do not exceed two gallons to any one consumer in any one day, the producer so selling milk shall be exempt from the provisions of this act.*" (emphasis supplied)

STATEMENT

On November 20, 1962, the Milk Control Commission of the Commonwealth of Pennsylvania filed a complaint in equity in the Court of Common Pleas of Montgomery County, Pennsylvania (R. 3a) seeking an injunction against Joseph Battista, Frank DiGiambattista and Albert B. DiGiambattista trading as Nor-View Farm, 670 North Henderson Road, King of Prussia, Pennsylvania. The complaint sought to restrain the continued retail sale of milk from the present appellants' farm at prices less than fixed by the Milk Control Commission.

On November 30, 1962, on behalf of present appellants there were filed preliminary objections (R. 7a)

composed of two parts: (1) Motion for more specific pleading, requesting that the complaint be amended to aver what specific portions of the Milk Control Law were being violated; and (2) raising the defense of an unconstitutional provision in Section 402 of the Milk Control Law.

The parties entered into a Stipulation of Facts (R. 12a). Under the terms of that Stipulation it was made clear in Paragraph 9 thereof that the action was limited to a charge of violating Section 402 of the Milk Control Law. The matter having been so stipulated between the parties there was no need to consider the motion for more specific pleading contained in the preliminary objections: See also amended complaint (R. 10a).

Section 402 of the Pennsylvania Milk Control Law contains an exemption provision (see statute quoted above) which provides that milk sold from the farm where produced is exempt from price regulations of the Milk Control Commission provided certain conditions are met. Paragraph 9 of the Stipulation makes clear that the only condition the present appellants are charged with violating and which therefore would result in their not qualifying for the exemption from price regulation is the condition which reads, ". . . and such milk has at no time left the producer's farm prior to its sale to the consumer . . ."

Appellants' milk is taken off the farm where produced and sold for purposes of having the milk pasteurized, homogenized and bottled and it is appellants' position that the only restrictive condition which they are charged with violating is unconstitutional and therefore unenforceable and hence they qualify under

the exemption from price regulation for milk sold from the farm where produced.

The question as to whether or not that portion of Section 402 of the Pennsylvania Milk Control Law which appellants were charged with violating is unconstitutional as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States was raised by preliminary objections to the complaint in this language:

"Preliminary Objections

"And now come the defendants, Joseph Battista, Frank DiGiambattista and Albert DiGiambattista and by their attorney, J. Brooke Aker, Esq., files the following preliminary objections to the plaintiff's complaint.

"Motion for More Specific Pleading

* * *

"Defense of Unconstitutional Provision in Milk Control Laws

"3. Under Section 402 of the Milk Control Law (1937 P.L. 417; § 402, as amended 1959 P.L. 1587) milk produced and sold from the farm on which said milk is produced is exempt from all provisions of the Milk Control Law. Any conditions set forth in Section 402 which would appear to make that Section inapplicable to defendants' present acts and practices are unreasonable, arbitrary, discriminatory, capricious, and demonstrably irrelevant to the object the legislature was trying to obtain, and such conditions are hence in violation of the due process clause contained in the Fourteenth Amendment to the Constitution of the United States and in Article I, Sections 1 and 9 of the Constitution of the Commonwealth of Pennsylvania and such conditions also constitute

special legislation of a kind prohibited by Article III, Section 7 of the Pennsylvania Constitution and therefore any such conditions are void.

"Wherefore, defendants request this Court to deny plaintiff the injunction requested."

Based on the stipulated facts, and after argument and submission of briefs, President Judge E. Arnold Forrest for a unanimous court en banc of the Common Pleas Court of Montgomery County, Pennsylvania, filed an opinion and order sustaining the preliminary objection. The court held to be unconstitutional that part of Section 402 of the Pennsylvania Milk Control Law which appellants are charged with violating, directed the prothonotary to enter judgment for the appellants, and assessed costs against the appellee (see opinion appended as Exhibit B).

From this decision by the court of first instance the Milk Control Commission of the Commonwealth of Pennsylvania filed its appeal to the Supreme Court of Pennsylvania which court, after the filing of briefs and oral argument, sustained the appeal and reversed the decree of the lower court, upholding the statutory language in question as being constitutional. The opinion was filed March 24, 1964 with Chief Justice John C. Bell, Jr., dissenting. The decree of the Pennsylvania Supreme Court is as follows (the entire opinion is appended as Exhibit A):

"On the record before us, and particularly in view of the undoubted power of the Legislature to regulate the entire milk industry effectively, we cannot hold that the limitation on exemption here challenged clearly, palpably and plainly violates the Constitution of Pennsylvania or of the United States, or that the classification created is patently arbitrary and utterly lacking in rational justifica-

tion. Nor can we hold that the classification bears no reasonable relation to the price structure which the Milk Control Commission is statutorily empowered to fix and maintain in a particular marketing area. In the absence of substantial and persuasive evidence to the contrary, the statute must stand.

"Decree reversed. Each party to bear own costs.

"Mr. Chief Justice Bell dissents."

The Pennsylvania Supreme Court having upheld the state statute as constitutional, it is believed that this Court has jurisdiction over this appeal under statute of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. § 1257(2).

THE QUESTION IS SUBSTANTIAL

Although this Court decided in 1934 that price control of the milk industry did not violate the due process rights of a retail store owner (*Nebbia* v. *New York*, 291 U.S. 502), that case in no way supplies a definitive answer to the present case for the following reasons:

1. The due process rights of farmer-producers to sell directly at retail from the producing farm have never been passed upon by this Court. The *Nebbia* case arose from a conviction of a storekeeper for selling milk below established retail price. The entire opinion talks of retail price regulation as being necessary to protect the farmer-producer. The effect of price controls such as exist in the present case and which discriminate between large and small producers was not involved in the *Nebbia* case nor in any case since then. It would seem that the New York statute in *Nebbia* did not purport to cover direct retail sales by the farmer-producer and certainly the facts under which the case arose did not present such a problem for this Court's consideration.

2. The facts have changed substantially, requiring a re-analysis of the *Nebbia* case as applied to retail sales direct from the farmer-producer to the retail consumer. This "jug milk" method of selling milk did not exist in 1934 but now is so widespread throughout the nation as to require a re-examination of the problem of price control as applied to such operations. It is not suggested that the *Nebbia* case should be overruled, but only that it does not apply to these new facts and therefore a new opinion is needed.

3. *The law* has changed since 1934 and *the changes* may well now violate the due process clause. Although no cases have been brought to this Court since 1934 under the due process clause, but only under the interstate commerce clause, there have been substantial changes in the statutory regulation of the milk industry which seek to extend state control in a manner which, at least in Pennsylvania, does violate, we submit, the due process tests set forth in the *Nebbia* case. The *Nebbia* case made quite clear two general rules which, it is submitted, are both violated by the legislation now before this Court: (1) Although the dairy industry is subject to regulation and control by the state, any milk control law must not violate the due process provisions of the federal and state constitutions; and (2) the purpose behind the milk control laws, and the reason why the courts decided that the dairy industry should be subject to regulation and control, was to protect the consumer by guaranteeing to him an adequate and healthful supply of fresh milk and also to protect the milk producer so that he might receive an adequate price for his milk which would allow him to meet the necessary standards for the production of healthful milk.

4. The issue here is not whether any farmer has a constitutional right to sell at unregulated prices milk from his own farm only if sold directly from the producing farm to the retail consumer. *The issue here is whether, once a state grants exemption from price control for milk sold at retail from the producing farm, it is constitutional to superimpose restrictions which result in making the exemption available only to large producers who can afford to erect their own pasteurizing plant and unavailable to small producers who cannot afford to install such expensive equipment.* Such legislation obviously discriminates between large and small dairy-farmers, whereas the *Nebbia* case approved price control of the dairy industry to protect *all* farmer-producers.

5. The Pennsylvania Milk Control Law, although approved as not violating the commerce clause (*Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939)), has never been approved by this Court under the due process clause. Indeed the classification now complained of has never been passed upon by any court before the present case. This provision was added to the Pennsylvania law in 1959 and there is no comparable provision in the law of any other state. The Pennsylvania Milk Control Law as originally enacted did not contain the language now in question. The first exemption for milk sold on the farm where produced was included in the amendment of 1941 to Section 402 of the Milk Control Law: 1941 P.L. 443, Section 10. The language now before the Court was added in the amendment of 1959, P.L. 1587, Section 1. Prior to the 1959 amendment, Section 402 contained a proviso clause permitting cash sales of milk at unregulated prices in quantities not exceeding two gal-

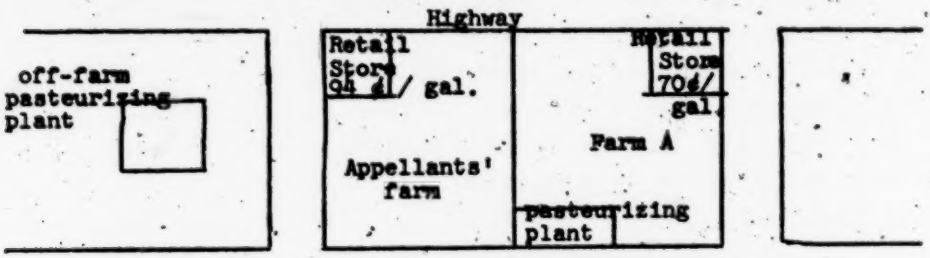
lons per day per consumer at the farms of producers. To this proviso the 1959 amendment added:

> "If he (the producer) shall have produced all the milk on the farm where sold *and such milk has at no time left the producer's farm prior to its sale to the consumer* . . ." (emphasis supplied).

The utterly capricious effect of the condition "and such milk has at no time left the producer's farm prior to its sale to the consumer" is made evident when one considers the facts contained in paragraph 25 of the Stipulation of Facts (R. 19a):

> "25. Defendants' [Appellants'] present cost of having their milk processed off the farm costs $.10 per gallon which price has been fixed in part because of machinery used by Maple Croft in processing defendants' milk which machinery is owned by defendants. *If defendants were to install their own pasteurizing plant they would meet the provisions of Section 402 and be able to sell at unregulated prices but their costs of processing would be increased so that they would sell the same mil' to the same consumer at prices in excess of $.88 per gallon but still below the minimum price fixed by the Milk Control Commission.*" (emphasis added)

This discriminatory result may be graphically portrayed by picturing two dairy farms hypothetically side by side. The owner of farm A is able to afford his own pasteurizing plant and he is therefore free to sell at unregulated prices. Appellants' farm, immediately adjacent to farm A, must sell at regulated prices, if this provision is constitutional, because the milk is processed off the farm.



6. The provision in question bears no reasonable relation to the objectives sought to be attained by milk control legislation. As pointed out in the cases of *Nebbia* v. *New York* and *Milk Control Board* v. *Eisenberg Farm Products*, the purpose of the milk control laws and of allowing any state to regulate the dairy industry was originally conceived as having a two-fold purpose, that is, protecting the consumer and protecting the producer. At the time those cases were decided the present language was not contained in the Pennsylvania Milk Control Law and the presently popular "jugged milk" method of selling milk from the farm where produced was not then known. If the 1959 amendment to the Milk Control Law inserting the meaningless limitation here involved is constitutional, the only person who can benefit is the retail milk dealer. Such legislation can only benefit such dealers at the expense of the farmer-producer and of the consumer, the very persons the original milk control legislation was designed to help.

The "jugged milk" method of selling milk at retail allows the farmer a larger return on his investment in his dairy farm and equipment than he is able to obtain by selling milk under regulated prices to independent retail dealers: See Stipulation pars. 18, 19, 20, 21 at R. 17a-18a. "Jugged milk" sales are all at Class I

prices for drinking milk rather than at the lower blend price resulting from other Class uses which the farmer can't control and for which he receives a lower price: Stipulation par. 22 and 23 at R. 18a-19a; Pa. Crop Reporting Service Bulletin 18, Pa. Dairy Statistics, pp. 5, 6. At the same time the consumer benefits by receiving milk of equal quality at reduced prices if the consumer is willing to travel to the producer's farm to obtain such milk. An average family of four children buying milk from the present defendants will save an average of $65-$75 per year over the cost of milk purchased from sellers bound by prices fixed by the Milk Control Commission. It is impossible to see why a method of operation which is so beneficial to the farmer-producer and so beneficial to the consumer should be curtailed in favor of a method of operation where the only benefit is to an independent retail milk dealer.

7. No other state in the United States has a provision in its milk control law which draws the distinction Pennsylvania does as to whether or not the milk is pasteurized off the farm. According to Pennsylvania Crop Reporting Service Bulletin No. 18 for 1962, p. 3, Pennsylvania is the fifth largest milk producing state in the United States. The three largest milk producing states in the order of production are Wisconsin, New York, and Minnesota. In New York, the milk control laws govern only prices which distributors must pay producers but there are no retail price controls whatsoever: 1937 L. ch. 383, § 1, as am., 2B McKinney's Consolidated Laws of New York Annotated, Art. 21, § 258-m. Wisconsin and Minnesota have no milk control price laws, each only prohibiting sale below cost. Within the last five years, retail milk

price-fixing was terminated in Connecticut (1959), Massachusetts (1960), Rhode Island (1962), Washington (1962) and Oregon (1962). There are now only 19 states* in the United States which have some sort of milk control laws in operation. Of these only 13** authorize the fixing of retail consumer prices; several states allow sales from the producing farm at unregulated prices because the statute by its terms does not purport to cover such sales and hence no exemption is needed. Of the 19 states with milk control laws, Pennsylvania is the only one which attempts a classification based upon the immaterial circumstance of whether or not the milk leaves temporarily for pasteurization. In view of such overwhelming evidence of the situation in sister states, it is impossible to justify the present classification as necessary to bar "chaotic conditions in the milk market" in Pennsylvania, as the Pennsylvania Milk Control Commission would have us believe.

8. At the time (some thirty years ago) that this Court decided the landmark cases approving state control of the milk industry, one of the reasons advanced for approving control of the industry was to help guarantee the farmer an adequate price for his milk. Over the intervening 30 years the economic plight of the farmer-producer has worsened considerably. Pennsylvania as one of the five largest milk producing states, may be said to be typical. The situation in Pennsyl-

---

* Alabama, California, Florida, Georgia, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Vermont, and Virginia.

** Alabama, California, Florida, Georgia, Maine, Mississippi, Montana, Nevada, New Hampshire, New Jersey, Pennsylvania, Vermont, Virginia, and to a limited extent North Carolina.

vania is set forth in Paragraphs 20, 21 and 22 of the Stipulation of Facts in this case (R. 18a):

> "20. Over the past 30 years, the total number of dairy farmers (producers) operating in the State of Pennsylvania had declined from 139,684 dairy herds in 1929 to 59,001 herds in 1959: Pa. Crop Reporting Service Bulletin 18 for 1962, p. 7.
>
> 21. The total number of milk producer-distributors operating in the State of Pennsylvania has declined nearly 80% in the 25 years prior to 1961: Pa. Crop Reporting Service Bulletin 18 for 1962, p. 4.
>
> 22. The Pennsylvania season average blend price (average price for all classes of usage to which milk is put which usage is at the option of the dealer) paid to producers per 100 pounds of milk wholesale has declined according to the following chart from p. 21 of Pa. Crop Reporting Service Bulletin 18 for 1962:

1952	5.19
53	4.84
54	4.53
55	4.50
56	4.61
57	4.92
58	4.91
59	4.89
60	4.74
61	4.71"

To combat this declining income in the face of the rising cost of living dairy farmers all across the country have been forced to find some means of increasing their income. The solution which they have seized upon has been this "jugged" milk method of retail sales. With this method of direct sales from producer

to consumer, the individual dairy farmer for the first time in 30 years has available to him a means of getting a fair return on his investment and labor—a chance to be able to send his children to college and otherwise share in the benefits of the economic growth of this country.

But here in Pennsylvania, a meaningless classification which does not exist in any other state threatens to limit such "jugged" milk sales in this state as compared with other states; even worse, it discriminates in favor of large farmers and against small farmers by making the determining factor whether or not the individual farmer can afford to erect his own pasteurizing, homogenizing, and bottling plant.

9. It should be made clear that there is no question in this case about the healthful quality of appellants' milk. The stipulation of facts states that "all health requirements of any sort have been and are being fully complied with" (R. 14a). And although Section 402 of the Pennsylvania Milk Control Law conditions the exemption in several ways, only the single condition against removing the milk from the producing farm for pasteurization prior to sale is now involved; all other conditions being "treated as having been fully complied with" under the stipulation (R. 14a).

For these reasons we submit that it is imperative that this Court once again give the due process aspects of this problem a complete review, as a guide to dairy farmers across the nation in the conduct of their "jug milk" operations. It is therefore requested that the Court give this case plenary consideration, with briefs on the merits and oral argument.

ALTERNATE CONSIDERATION

If for any reason this appeal is considered improvidently taken, request is made that the appeal papers be considered and acted upon as a petition for writ of certiorari under authority of June 25, 1948, c. 646, 62 Stat. 962, 28 U.S.C. 2103.

Respectfully submitted,

FREDERICK A. BALLARD
JOHN W. KERN, III
912 American Security Building
Washington, D. C. 20005

J. BROOKE AKER
60 E. Penn Street
Norristown, Penn., 19404

Attorneys for Joseph Battista, et al., Appellants

EXHIBIT A

MILK CONTROL COMMISSION, *Appellant*,

v.

BATTISTA.

Constitutional law—Constitution of Pennsylvania—Article I, §§ 1 and 9—Article III, § 7—14th Amendment—Due process—Milk Control Law of 1937, P. L. 417, § 402.

1. The provision in the Milk Control Law of 1937, P. L. 417, § 402, which exempts certain persons from the provisions of the Act who have produced all the milk on the farm where sold "and such milk has at no time left the producer's farm prior to its sale to the consumer" does not violate the due process clause of the 14th Amendment to the Constitution of the United States or the Constitution of Pennsylvania, Article I, §§ 1 and 9, and Article III, § 7. [653-60]

2. An Act of Assembly will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. [659]

Mr. Chief Justice Bell dissented.

Argued January 7, 1964. Before BELL, C. J. MUSMANNO, JONES, COHEN, EAGEN, O'BRIEN and ROBERTS, JJ.

Appeal, No. 13, Jan. T., 1964, from decree of Court of Common Pleas of Montgomery County, No. 62-10954, in equity, in case of Milk Control Commission of the Commonwealth of Pennsylvania v. Joseph Battista, Frank DiGiambattista and Albert B. DiGiambattista, trading as Nor-View Farm. Decree reversed.

Equity.

Defendants' preliminary objections sustained and decree entered for defendants and against plaintiff, opinion by FORREST, P. J. Plaintiff appealed.

Anthony W. Novasitis, Jr., Assistant Attorney General, with him *William D. Morgan*, Assistant Attorney General, and *Walter E. Alessandroni*, Attorney General, for Milk Control Commission, appellant.

J. Brooke Aker, for appellees.

OPINION by MR. JUSTICE ROBERTS, March 24, 1964:

The Pennsylvania Milk Control Commission filed a complaint in equity in the Court of Common Pleas of Montgomery County to enjoin appellees, trading as Nor-View Farm, from selling milk which had been removed from the farm prior to sale to consumers at less than minimum prices established by the commission.[1] At the time the action was filed, the named defendants were not licensed by the commission, nor was any application for a license pending. The milk sold originated on Nor-View Farm from appellees' own herd. Not having their own processing plant, appellees removed the milk in its bulk state to a nearby dairy, where it was pasteurized, homogenized, bottled, and returned to appellees' farm for sale.

By preliminary objections, appellees asserted that they were exempt from the licensing and pricing provisions of the Milk Control Law, April 28, 1937, P. L. 417, as amended, 31 P.S. §§ 700j-101—700j-1302 (Supp. 1963). Section 402 (31 P.S. § 700j-402 (Supp. 1963)), under which the exemption is claimed, declares: "The commission may, by official order, exempt from the license requirements provided by this act milk dealers or handlers . . . . However, milk dealers or handlers exempted by this section from the license requirements of this act shall continue to be subject to all the other provisions of this act relating to milk dealers or handlers: Provided, however, That in cash sales of milk, to consumers in containers owned and provided by the consumer, if he shall have produced all the

[1] The injunction was sought pursuant to § 1004 of the Milk Control Law, April 28, 1937, P.L. 417, 31 P.S. § 700j-1004.

milk on the farm, where sold *and such milk has at no time left the producers farm prior to its sale to the consumer* and he shall have neither purchased nor received milk from other producers or handlers and his total sales to consumers do not exceed two gallons to any one consumer in any one day, the producer so selling milk shall be exempt from the provisions of this act." (Emphasis supplied.)[2]

Appellees' argument involves two phases. First, they contend that the requirement that milk remain on the producer's farm prior to sale to customers (italicized in the quotation above) is unreasonable, arbitrary, discriminatory, capricious and beyond the scope of the legislative purpose. More specifically, they urge that it is violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States, Article I, §§ 1 and 9 of the Pennsylvania Constitution, and Article III, § 7 of the Pennsylvania Constitution which prohibits special legislation. Second, they urge that so construed, the clear language of § 402 exempts their operation from regulation under the Milk Control Law.

The parties stipulated that "the only issue involved in the present controversy is the right of defendants to sell milk at unregulated prices where such milk is processed off the farm where produced and sold."[3]

The court below sustained the preliminary objections, holding that ". . . there appears to be no rational basis for the distinction whereby an exemption is granted in cases where the farmer pasteurizes his milk on his own

---

[2] Section 402 covers what the industry calls "jugged milk" operations. There are 58 operations in Pennsylvania where the producer pasteurizes his own milk, and there are approximately 175 which sell raw milk, but both groups sell at unregulated prices below those set by the Commission.

[3] As a consequence of this stipulation, the fact that the milk was sold in containers other than those provided by the consumer is not material to the disposition of this case.

farm and denied where he takes his milk elsewhere for pasteurizing and returns the milk to his farm for sale." In support of this conclusion, the court cited *Milk Control Commission* v. *Stoker*, 36 Northhampton Rep. 1A, (June 7, 1962), in which the same result was reached. This appeal by the Commonwealth followed.

In *Nebbia* v. *New York*, 291 U.S. 502, 538 (1934), the United States Supreme Court, sustaining state regulation of milk and of retail prices, noted: "If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixed prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other."

Prior decisions of this Court have sustained the constitutionality of the Pennsylvania Milk Control Acts and have held that licensing and price fixing in this area are valid exercises of the police power of the Commonwealth. *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 332 Pa. 15, 1 A. 2d 775 (1938); *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 Atl. 336 (1936).

Neither the United States Constitution nor the Constitution of Pennsylvania prohibit economic classification or regulation by the Legislature if the statutory classification of subjects is based upon valid distinction. *Sablosky* v. *Messner*, 372 Pa. 47, 92 A. 2d 411 (1952).

The effectiveness of the Pennsylvania Milk Control Law is based primarily on its price fixing authority. Without

control of price and related regulatory provisions, its broad objectives, including maximum sharing of surplus and equal treatment for all producers, might not be attained.[4]

In Section 402, the Legislature has set forth the conditions under which farmer-producers may sell directly to consumers the milk of their herds produced on their farms without disrupting or endangering effective regulation of the remaining industry. In exempting the producer-handler, the Legislature not only sought to aid him in selling such milk but also to give recognition to the historical custom that individual, self-sufficient farm activity has traditionally been free of many forms of licensing and regulations. This exemption is an acknowledgement by the Legislature of the need to permit the local, family farm to continue to function unregulated by the Milk Control Commission in this particular activity.

We are not able to conclude that the limitation here under attack is not reasonably related to the achievement of the broad purpose of the Law. Complete exemption without the restriction that the milk at no time leave the producer's farm prior to sale might well result in a competitive advantage to the producer over other producers and dealers which the Legislature, in its judgment, sought to avoid as detrimental to the orderly and proper regulation of the entire industry.

Without discussing the peculiar economic factors involved in marketing, surplus and pool prices, it is evident that were appellees' contention to prevail, the so-called "jug-dealer" would be accorded an unfair and substantial

[4] The legislation here under consideration is apparently not based upon the need to protect the public health or to maintain the sanitary condition of milk. A complete code for the inspection of dairy farms, the handling of raw milk, pasteurization, sanitation, and distribution is contained in numerous acts of the Legislature. See 31 P.S. §§ 511-683 (Supp. 1963).

advantage, not only over the regulated retailer, but more importantly over other milk producers who do not sell at retail and who are obliged to pool their product with other milk producers.[5] Conceivably, in the absence of the limitation complained of, the way may be opened to economically unwarranted expansion of herds and over-production by the exempt handler due to competitive advantages resulting from nonregulation. In that event, the stability of the industry may be imperiled and the legislative objectives defeated. Clearly, the Legislature was within its proper province in seeking to preclude such a result.

Careful consideration of the entire record satisfies us that all the Legislature intended to exempt in Section 402 was the family-farm type of producer-dealer operation. Surely, in the light of these legislative goals, the limitations set forth in Section 402 provide a reasonable test. In our view, it would be a contradiction of the legislative purpose and objective to permit the exempt farm opera-

---

[5] Producers selling at wholesale to a milk dealer are obliged to pool their product with other producers selling to such dealer, thereby receiving a blend price averaged in the proportion of the dealer's various uses of milk (fluid and manufacturing) as classified by the Milk Control Commission under Section 804 (31 P.S. § 700j-804). However, one entitled to the "jug-dealer" exemption can enjoy the higher valued fluid use for his own entire supply.

In *Nebbia* v. *New York*, supra at 517-518, a regulatory pooling scheme similar to that in Pennsylvania was described and justified as follows: "Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally [i.e., pooled] by all producers and all distributors in the milk-shed."

More recently to similar effect; see *Pola Ice Cream & Creamery Co.* v. *Andrews*, ... U.S. ...., 11 L. Ed. 2d 389, 393 (1964), at Note 3.

tion to receive its product from a commercial handler or to have its milk processed by such a dealer.[6]

In passing, we feel it necessary to distinguish two cases in which classifications in milk control legislation were struck down as arbitrary. In *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266 (1936), the United States Supreme Court invalidated a provision of New York's statute because the classification rested solely upon the time the dealer commenced operations in the industry. The Florida Supreme Court, in *Gustafson* v. *City of Ocala*, 53 So. 2d 658 (1951), struck down a municipal ordinance which compelled pasteurization of milk within the county of which the city was a subdivision before milk could be sold in that city. In both cases, it is obvious that the classification had no reasonable relation to the objectives of the general milk control legislation.

Most recently, in *Daly* v. *Hemphill*, 411 Pa. 263, 271, 191 A. 2d 835, 840 (1963), we restated and reaffirmed the long-established rule that "an Act of Assembly will not be declared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution." (Italics in the original.) Moreover, the burden rests heavily upon the party seeking to upset legislative action on constitutional grounds; all doubt is to be resolved in favor of sustaining the legislation. See *Anstine* v. *Zoning Board of Adjustment*, 411 Pa. 33, 36-37, 190 A. 2d 712, 714-15 (1963) and cases cited therein.

On the record before us, and particularly in view of the undoubted power of the Legislature to regulate the entire milk industry effectively, we cannot hold that the limitation on exemption here challenged clearly, palpably and plainly violates the Constitution of Pennsylvania or of the United States, or that the classification created is pat-

[6] Similar limitations in other jurisdictions have the same purpose and objective. See *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608 (footnote 11) (3rd Cir. 1961), cert. den. 372 U.S. 965 (1963).

ently arbitrary and utterly lacking in rational justification. Nor can we hold that the classification bears no reasonable relation to the price structure which the Milk Control Commission is statutorily empowered to fix and maintain in a particular marketing area. In the absence of substantial and persuasive evidence to the contrary, the statute must stand.

Decree reversed. Each party to bear own costs.

Mr. Chief Justice BELL dissents.

EXHIBIT B

MILK CONTROL COMMISSION

v.

BATTISTA ET AL.

Equity — Milk Control Act — Producer-seller — Milk pasteurized elsewhere — Constitutionality of act — Producer not subject to control.

1. Where milk producer, who sells his milk to consumers, had his milk pasteurized elsewhere than his own farm, the court held that he was exempt from the milk control law and held further that that portion of the law which subjects a producer, who sells his milk to consumers in containers owned by the customers, to control of the milk control commission if his milk leaves his farm at any time prior to its sale is unconstitutional.

2. *Milk Control Commission* v. *Stocker*, 36 Northam. (issue of June 7, 1962), followed.

(Appealed to Supreme Court April 5, 1963.)

C. P. Montgomery County. No. 62-10954. Equity: Milk Control Commission of Pennsylvania v. Joseph Battista, Frank DiGiambattista, and Albert B. DiGiambattista, trading as Nor View Farm.

Preliminary objections to amended complaint.

J. Brooke Aker, of Smith, Cahall & Aker, for defendants.

FORREST, P. J., January 10, 1963: — This action to enforce the licensing provisions of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, as amended, is brought before us on a preliminary objection attacking a limitation on an exemption clause as arbitrary, capricious and unconstitutional. Section 402 of said act, as last amended by the Act of November 21, 1959, P. L. 1587, § 1, 31 P. S. 700j-402, provides inter alia "That in cash sales of milk, to consumers in containers owned and provided by the customer, if he shall have produced all the milk on the farm where sold *and such milk has at no time left the producer's farm prior to its sale* . . . the producer so selling milk shall be exempt from the provisions of this act." (Italics supplied.)

The parties hereto have stipulated that the milk produced on the defendants' farm is taken from the farm for purposes of pasteurization and then is returned to the farm for cash sale to consumers in containers owned and provided by the customers. The sole question is whether the italic portion of the above-quoted exempting clause is valid or not.

The constitutionality of milk control laws, including price fixing, has been sustained in various decisions in the United States Supreme Court and in the Supreme Court of Pennsylvania. The Pennsylvania legislature declared in its statement of purpose that it enacted the law "for the protection of the public health and welfare and for the prevention of fraud": Milk Control Law, § 101, 31 P. S. 700j-101. The preamble to the act of 1937 contains legislative

findings in effect that price fixing is necessary in order to protect milk producers and consumers from imposition by private combinations of dealers.

In the case of sales direct from the producer to the consumer, manifestly the dealers singly or in combination are not in a position to impose on the producers or the consumers. Hence, there is rational support for the granting of an exemption from regulation in the case of sales direct from producer to consumer. However, there appears to be no rational basis for the distinction whereby an exemption is granted in cases where the farmer pasteurizes his milk on his own farm and denied where he takes his milk elsewhere for pasteurizing and returns the milk to his farm for sale.

The question raised in this case is exactly the same as was decided in favor of the producer in *Milk Control Commission* v. *Stocker*, 36 Northam. (issue of June 7, 1962), opinion by Woodring, J. The commission took no appeal from the order in the *Stocker* case, supra, and we adopt that opinion as our own.

Order

And Now, January 10, 1963, the preliminary objection raising the defense of the unconstitutionality of part of § 402 of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, as amended by the Act of November 21, 1959, P. L. 1587, § 1, italicized in the foregoing opinion is sustained.

The prothonotary is directed to enter judgment for the defendants and against the plaintiff. Costs on plaintiff.

Office-Supreme Court, U.S.
FILED
AUG 19 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 295

JOSEPH BATTISTA, FRANK DiGIAMBATTISTA and ALBERT B. DiGIAMBATTISTA, Trading as NORVIEW FARM,

Appellants

v.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee

MOTION TO DISMISS OR AFFIRM

ANTHONY W. NOVASITIS, JR.
Assistant Attorney General

WALTER E. ALESSANDRONI
Attorney General

Attorneys for Appellee, Milk Control Commission of the Commonwealth of Pennsylvania

State Capitol
Harrisburg, Pa.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

5

INDEX

	Page
Motion To Dismiss or Affirm:	
Statement	1
Question Presented	4
Summary of Argument	5
Argument	7

TABLE OF CITATIONS

Cases:	
Borden's Farms Products, Inc. v. Ten Eyck, 297 U.S. 251, 261	13
Elm Spring Farm v. United States, 127 Fed. 2d 920 (1 Cir. 1942)	12
Hageman Farms Corp. v. Baldwin, 293 U.S. 1963	13
Ideal Farms, Inc. v. Bensen, 288 Fed. 2d 608 (3rd Cir.), cert. den. 1961, 372 U.S. 965	11
Milk Control Board of Pennsylvania v. Eisenberg Farms Products, 306 U.S. 346	9
Nebbia v. New York, 291 U.S. 502	5, 7, 8, 9, 11, 12
Penn Dairies, Inc. v. Milk Control Comm. of Pennsylvania, 318 U.S. 261, 279	9
Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 361, 378	13
Shawangunk Co-Operative Dairies v. Jones, 153 Fed. 2d 700 (2nd Cir. 1946)	12
United States v. Rock Royal Co-Op., Inc., 307 U.S. 496	12
Statute:	
Act of April 28, 1937, P.L. 417, as amended, 31 PS Secs. 700j-101—700j-1302	2, 9
Constitution:	
United States Constitution, Fourteenth Amendment	3, 5

IN THE
SUPREME COURT OF THE UNITED STATES

No.

Joseph Battista, Frank DiGiambattista and Albert B. DiGiambattista, Trading as Norview Farm,
Appellants

v.

Milk Control Commission of the Commonwealth of Pennsylvania,
Appellee

MOTION TO DISMISS OR AFFIRM

Appellee moves that present appeal be dismissed or that the final decree of the Supreme Court of Pennsylvania in the present case be affirmed on the grounds that the Federal question presented is so unsubstantial as not to warrant argument thereon.

STATEMENT

Appellee submits that the issue raised by this appeal presents no substantial Federal question for the reason that the rule of law governing the issue presented here is

well settled by a long line of decisions of the Supreme Court of the United States. Accordingly, there is no basis or valid reason for additional argument thereon.

The Commonwealth of Pennsylvania by its Milk Control Law regulates and controls the entire milk industry within the Commonwealth through the process of price control since 1937 on a permanent basis and prior thereto from 1933 on a temporary basis.[1] The Pennsylvania Milk Control Law authorizes the establishment of minimum resale prices of milk to consumers and the price handlers or dealers are required to pay for milk received from their producers. The Pennsylvania Milk Control Commission is the administrative body formed to carry out the purposes and provisions of the Pennsylvania Milk Control Law. Section 402 of the Pennsylvania Milk Control Law enumerates the exemptions from price control and regulation. The proviso portion is set forth in the margin.[2]

In the instant case, appellant, a producer-handler removed milk he produced on the farm to a processing plant of a nearby handler for pasteurization, homogenization and finally bottling in one-half gallon and gallon glass containers, which bottled milk was then returned to appellants farm for sale at retail to consumers below the minimum

---

[1] Pennsylvania Milk Control Law, April 28, 1937, P. L. 417, as amended, 31 P.S. Sections 700j-101—700j-1302.

[2] "Provided, however, that in cash sales of milk to consumers in containers owned and provided by the consumer, if he shall have produced all milk on the farm where sold and such milk has at no time left the producer's farm prior to its sale to the consumer and he shall have neither purchased nor received milk from other producers or handlers and his total sales to consumers do not exceed two gallons to any one consumer in any one day, the producer so selling milk shall be exempt from the provisions of this act. As amended 1959, Nov. 21, P. L. 1587, Sec. 1."

retail sales price established by the Pennsylvania Milk Control Commission. The net effect of appellant's attack is that the Commonwealth in controlling the prices for the milk appellant sells violates, as to him, the due process clause in the 14th amendment to the Constitution of the United States.

Appellant contends that the rule of law that the State has the power to control the resale price of milk need not be reversed but on the contrary submits that the facts of the present case are distinguishable from the leading case establishing this longstanding rule of law as applied to the milk industry and accordingly is not applicable herein. Appellee submits that the rationale of the appellant is without merit and substance.

The Commonwealth of Pennsylvania further submits that the business conducted by appellant is of such a character that the Commonwealth may properly control the resale prices of the milk sold by appellee and it is immaterial that the business be conducted by a producer-handler or by any other milk dealer or handler. The function performed is the governing factor and not the descriptive labels.

QUESTION PRESENTED

The following question is presented by this appeal:

1. May a State control, within the due process clause, the price of milk sold by producers-handlers when the milk of the producer leaves the farm of the producer prior to the sale at retail to a consumer?

SUMMARY OF ARGUMENT

Long before the instant case was instituted, the Supreme Court of the United States had settled the question that the State has the power to regulate the milk industry through the means of price control. The net effect of the appellant's attack of that portion drawn herein of the Milk Control Law is to again test the propriety of the State to effectively regulate the milk industry. Since price control of the milk industry has been established by this Court as not violating the Due Process Clause of the Fourteenth Amendment, the appellant does not present a substantial Federal question.

The landmark decision (*Nebbia vs. New York*, 291 U. S. 502) considered in detail the evils sought to be eliminated by the regulation of the milk industry within the State of New York. The same considerations and rationale upon which this Court based its holding that price control in the milk industry did not violate due process is equally applicable and governs the present situation insofar as the protection to the producers is concerned. The purpose of the limitations on exemption drawn in question here was to equalize the position of all producers so that one may not obtain an advantage over another with regard to the fluid milk market. To argue otherwise would be in direct contradiction of the established purpose of milk control and the evils sought to be cured.

The instant case does not present a substantial question for the further reason that appellant attempts to

obtain jurisdiction on the theory that the business or economic conditions since 1934 have changed so that the well established rule of law is no longer applicable or if it is applicable, violates due process under present economic conditions. This is a matter not for this Court but for the Legislature.

ARGUMENT

A State may control the retail prices of bottled milk sold to consumers by a producer-handler without offending the due process clause.

Appellee, Commonwealth of Pennsylvania, submits that the question presented by appellant's appeal attacks a statute which is of a kind held constitutional by the Supreme Court of the United States.

Nebbia vs. New York, 291 U. S. 502, is the landmark case holding that the State, irrespective of the character of business, may control prices whenever such control could be reasonably related to a matter of public concern. Specifically, it held the State had the power to fix the retail price of milk. The requirements of due process was outlined in the *Nebbia* case, supra, by Justice Roberts, at page 527, in the following manner:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to endorse that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

The cornerstone of the effective regulation of the milk industry of Pennsylvania through the Pennsylvania Milk Control Law, like the New York Statute drawn in question in the *Nebbia* case, is through the medium of price control. This was clearly recognized by Justice Roberts when he said at page 538:

> "And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other".

The opinion in the *Nebbia* case details exhaustively the objects, purposes and evils sought to be eliminated by controlling the price for which milk shall be paid by the consumer and also paid by the dealers to the producer. The following language, at page 517 of the opinion is equally applicable to the instant case:

> "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus

milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

Both, the Pennsylvania Milk Control Law drawn in question by this appeal and the New York Law, were created by the existence of identical destructive economic conditions affecting the milk industry and each Law employed similar regulatory devices to stabilize the industry. This is substantiated by the lengthy preamble to the Pennsylvania Law and official legislative purpose as stated in the margin.[3] Accordingly, the present parrallel constitutional attack is well within the boundaries of this Court's holding in the *Nebbia* decision and precludes further consideration by this Court.

Further, this Court had before it the Pennsylvania Milk Control Act in *Milk Control Board of Pennsylvania vs. Eisenberg Farms Products*, 306 U. S. 346, wherein it held that the act manifested an attempt to reach and cure a domestic situation in the welfare of producers and consumers in the Commonwealth of Pennsylvania.

So too, in *Penn Dairies, Inc. vs. Milk Control Commission of Pennsylvania*, 318 U. S. 261, where Justice Murphy in the concurring opinion at 279 stated:

---

[3] In the exercise of the police power of the Commonwealth, it is hereby declared that the production, transportation, manufacture, processing, storage, distribution and sale of milk in the Commonwealth is a business affecting the public health and affected with a public interest, and it is hereby declared that this act shall be and is hereby enacted for the purpose of regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud. 1937, April 28, P. L. 417, art. 1, Section 101.

"We are not concerned here with just an ordinary state regulatory statute of nondiscriminatory character which affects the Federal government in some degree, but with a general measure designed to safeguard the health and well being of the public by insuring an adequate supply of wholesome milk at stable prices."

Historically, the specific provision of the act under attack herein was first enacted as an amendment to the original Milk Control Law in 1941 and further amended in 1959 in its present form as stated above. Prior to the amendments, the producer-handler who desired to sell milk at unregulated prices at their farm was prohibited. The legislative policy was to allow such producer-handler to be exempt from price control without intending to relax the control of the milk industry so as to cause a return to the unhealthy, uneconomic and destructive practices that the Milk Control Law originally sought to end.

Accordingly, the original purposes and objects sought in establishing price control, both at the consumer level and producer level, is controlling in the consideration of the present exemption as a whole and any specific provision in relation to due process.

To allow the appellant herein to conduct his business unregulated would have the obvious result of avoiding the objects of the Pennsylvania Milk Control Law that is, to achieve a fair division of the fluid milk market among all producers so that the sharing of the burden of surplus milk will be borne by all producers. Here the appellant would avoid this burden and obtain for himself a larger market for the more profitable fluid milk sales to the prejudice of the remaining producers.

The holding of the *Nebbia* case, supra, recognized the evils that large quantities of surplus milk leads to price cutting and other forms of destructive competition. When the present facts and statutory provision is tested by the objects of the act and the rationale employed in the *Nebbia* case, supra, the claim by appellant of discrimination fails.

Justice Roberts at page 527-528 in the opinion of the *Nebbia* case recognizes this very point when he states:

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain business may contract, or imposing terms if they do enter into agreements, are within the state's competency." (See cases cited.)

And further on page 538-539, Justice Roberts states:

> "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people".

To the same effect is the holding in *Ideal Farms, Inc. vs. Benson*, 288 Fed. 2nd 608 (3rd Cir.), cert. den. 1961, 372 U. S. 965. The Circuit Court upheld the order of the Secretary of Agriculture issued pursuant to the Agriculture Marketing Agreement Act of 1937 as amended (7 U.S.C.A. 601 et seq.) wherein a producer (Ideal Farms) in the business of processing and distribution of milk, some of which was purchased from another corporation,

but who also produced a substantial portion of his own milk, was not entitled to the exemptive provisions of Federal Order No. 27, to that portion of the milk Ideal Farms produced on its own farm, but was required to account to the Producer Settlement Fund on its own milk, which resulted in sharing on its own milk its proportionate share of the surplus milk in the market. See also *Elm Spring Farm vs. United States,* 127 Fed. 2nd 920 (1 Cir. 1942) and *Shawangunk Co-operative Dairies vs. Jones,* 153 Fed. 2nd 700 (2nd Cir. 1946) dealing with exemptive provisions of orders issued pursuant to the same Federal Act.

This Court in *United States vs. Rock Royal Co-op., Inc.,* 307 U. S. 496, considered the validity of the Agriculture Marketing Agreement Act of 1937 and the orders issued by the Secretary of Agriculture equalizing the minimum prices to be paid producers for milk sold to dealers. In sustaining the validity of the said Act and the orders, this Court held that the purpose of the Act and the orders issued pursuant thereto is to achieve a fair division of the fluid milk market among all producers, thereby eliminating the disorganization which has theretofore been the consequence of competition among producers for the more profitable fluid milk market (Opinion of the Court, pages 548, 550).

In the *Rock Royal* case, supra, this Court had before it the regulation which exempted milk received from the handler's own farm from the effect of the order of the Secretary of Agriculture and this Court did not say that the Agriculture Marketing Agreement Act of 1937 would not permit such type of exemption (Opinion of the Court, page 551, note 14).

The Supreme Court of the United States has consistently reaffirmed the holding of the *Nebbia* case, supra,

and as recently as 1964, this Court stated in *Polar Ice Cream and Creamery Co. vs. Andrews*, 375 U. S. 361, 378:

> "Nebbia vs. New York, 291 U. S. 502 establishes that minimum retail and wholesale prices for milk produced and sold within the State do not offend the Due Process and Equal Protection Clauses".

In *Hageman Farms Corp. vs. Baldwin*, 293 U. S. 1963, this Court upheld an order issued pursuant to the New York Milk Control Statute fixing a minimum price for payment to producers pursuant to the Milk Control Law of New York, which had the effect of denying the complaining dealer to make a profit from the resale of the milk as not being in violation of the due process clause.

In *Borden's Farms Products Co., Inc. vs. Ten Eyck*, 297 U. S. 251, 261, this Court upheld the legislative regulatory scheme for assisting the milk industry by permitting discrimination between dealers who had and dealers who had not well advertised tradenames in allowing the latter dealer to sell bottled milk at a price one cent less than the price prescribed for the former.

For the reasons stated above, it is respectfully submitted that the present appeal be dismissed or, in the alternative that the final decree of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

ANTHONY W. NOVASITIS, JR.,
Assistant Attorney General,
WALTER E. ALESSANDRONI,
Attorney General,
Attorneys for Milk Control Commission of Commonwealth of Pennsylvania, Appellee.